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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EPL HOLDINGS, LLC,
Plaintiff-Counterclaim Defendant,
v.
APPLE, INC.,
Defendant-Counterclaimant.

No. 12-cv-04306 (JST)

OPENING CLAIM CONSTRUCTION
BRIEF OF PLAINTIFF EPL
HOLDINGS, LLC

Judge: Hon. Jon S. Tigar

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I. INTRODUCTION

Computers and digital technology have provided many new ways to store and playback a variety of different types of media, including, for example, audio such as music, or recorded speech. Consumers of such media sometimes need to change the speed of playback of the material. This can be useful, for example, when listening to recorded speech (such as an audiobook) in order to speed up the playback and reduce the time needed to listen to the book while still comprehending the material it contains. Recognizing the importance of such features for podcasts, audio books, learning materials, and video, Apple has incorporated them into many of its devices that facilitate media playback, including its popular iPhone and iPad devices, as well as its computers.

Plaintiff EPL Holdings, LLC (“EPL”) asserts four patents in this case that facilitate these features. The asserted patents can be grouped into two categories. The first, U.S. Patent 5,175,769 (the “‘769 patent”), relates to a method for altering the playback speed of a signal (such as an audio signal) in a way that will not alter its pitch. Using the analogy of a record player with multiple speeds, it is generally understood that if a user played a 45 RPM record on the 78 RPM setting, the audio would speed up, and the pitch would also go up (resulting in the recording sounding like the animated Alvin and the Chipmunks characters). If one played the same 45 RPM record on the 33 RPM setting, the audio would slow down, and the pitch would also be lower. The ‘769 patent discloses a method for manipulating a signal by changing its duration to effectively alter its playback speed by overlapping certain portions of the audio, so that the resulting pitch is not changed.

The other three patents-in-suit, all derive from a common parent application and share a specification. Those patents, U.S. Patent 7,683,903 (the “903 patent”), U.S. Patent 8,345,050 (the “050 patent”), and U.S. Patent 8,384,720 (the “720 patent”) all relate to methods and devices for rendering, or playing back, media files and the types of technological adaptations that are necessary to allow those files to be rendered correctly, even when they are played back at faster or slower speeds than they were recorded.

1 The parties have identified seven terms or phrases about which they dispute the proper
2 construction. As to two of these terms or phrases, EPL contends that they require no
3 construction and have a sufficient meaning without rewriting or re-interpretation. As to others,
4 EPL relies upon straightforward meanings set forth explicitly in the relevant patent
5 specifications. Apple offers constructions that modify the clear meaning of terms set forth in the
6 patents and seeks to import extraneous limitations into the patent claims. Such importation of
7 extraneous limitations is not consistent with the well-established principles governing claim
8 interpretation, and should be rejected here in favor of the straightforward interpretations offered
9 by EPL, which derive directly from the specifications and do not impermissibly modify the
10 claims from the scope as written.

11 **II. BACKGROUND**

12 Plaintiff EPL is the successor to Enounce, Incorporated, a company founded in 1998 by
13 Donald Hejna, inventor of the asserted '769 patent. EPL holds the patent rights relating to
14 several Enounce technologies, including Enounce's Variable Speed Playback software product
15 called MySpeed. MySpeed software allows users to interactively increase or decrease the
16 playback speed of videos, such as videos found on YouTube, from 0.3x the original speed, to 5x
17 the original speed. This technology allows users to speed up content in order to save time while
18 still comprehending material, or to slow down content (such as a recorded lecture or tutorial) for
19 greater understanding or ease in transcribing. The technology also helps when listening to
20 material in a foreign language.

21 All but one of the terms or phrases disputed by the parties are found in the '769 patent.
22 That patent, entitled Method For Time-Scale Modification Of Signals issued on December 29,
23 1992 from an original application filed July 23, 1991. The patent was issued by the patent office
24 without rejection by the patent examiner. EPL asserts infringement of claims 1, 2, 10, 11 and 19
25 of the '769 patent. A copy of the '769 Patent is submitted with the accompanying Declaration of
26 Brian Ledahl as Exhibit A.¹ The basic technology of the '769 patent deals with a method for

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¹ Unless otherwise indicated, all Exhibit references will be to the Ledahl Declaration.

1 altering the duration and consequently the speed of playback of media files, such as audio by a
2 particular method outlined in the claims. The patent specification contains examples of
3 techniques that can be implemented to alter playback speed without altering the pitch of the
4 signal.

5 The sole remaining claim term in dispute, “current time” is found in the three remaining
6 patents, the ‘903 patent, the ‘050 patent, and the ‘720 patent. All three of those patents share the
7 same specification. A copy of the ‘903 patent is submitted as Exhibit B, a copy of the ’050
8 patent is submitted as Exhibit C, and a copy of the ‘720 patent is submitted as Exhibit D. For
9 simplicity, in discussing this term EPL will refer to citations from the specification of the ‘903
10 patent, though the same passages appear in each of these three patents. EPL asserts infringement
11 of claims 1, 3, 4, 6, 12, 13, 16 and 22 of the ‘903 patent, claims 1, 3, 4, 5, 8, 10, 13, 15, 16, 17,
12 20, 22, 25, 26, 27, 28, 29, 30, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42, 43, 44, 47, 48, 49 and 50 of
13 the ‘050 patent, and claims 1, 6, 7, 10 and 11 of the ‘720 patent. The ‘903 patent family relates
14 to computer implementations of systems for rendering media files, such as audio files, and the
15 technical issues that are involved in changing the playback speed of those files because different
16 components of the system require different information about the current location in the media
17 file being played back and the amount of data required. For example, if an audio file is played
18 back at twice its normal speed (2x), then two minutes of the recorded file would be played back
19 in one minute of presentation time. The ‘903 patent family addresses the need to provide
20 different components of the rendering system with the correct measure of time relevant to that
21 component – some components require the amount of elapsed presentation time (one minute to
22 play the sped-up material in this example), while others require the amount of elapsed content or
23 data time (two minutes of original source material before the processing occurs in this example).

24 **III. CLAIM CONSTRUCTION PRINCIPLES**

25 Interpreting the proper meaning and scope of a patent claim is a question of law
26 exclusively for the Court to decide. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 970-
27 71 (Fed. Cir. 1995). “In claim construction the words of the claims are construed independent of

1 the accused product, in light of the specification, the prosecution history, and the prior art.”
 2 *Embrex, Inc. v. Serv. Eng’g Corp.*, 216 F.3d 1343, 1347 (Fed. Cir. 2000). “The construction of
 3 claims is simply a way of elaborating the normally terse claim language[] in order to understand
 4 and explain, but not to change, the scope of the claims.” *Id.*

5 **A. Not Every Term Needs Construction**

6 All words have definitions and may theoretically be defined. This does not mean that all
 7 words need to be defined. Simply put, claim construction is “not an obligatory exercise in
 8 redundancy.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). Where
 9 a term is used in accordance with its plain meaning, the court should not re-characterize it using
 10 different language. *Mentor H/S, Inc. v. Medical Device Alliance, Inc.*, 244 F.3d 1365, 1380
 11 (Fed. Cir. 2001). When claim terms are clear on their face, and there is no legitimate dispute
 12 regarding their meaning, no construction is necessary. *Netflix, Inc. v. Blockbuster, Inc.*, 477 F.
 13 Supp. 2d 1063, 1068 (N.D. Cal. 2007) (“A district court need not construe every single disputed
 14 word”). Commonly-understood English words “need no clarification.” *Id.* As these precedents
 15 make clear, the mere fact that one party proposes an interpretation of a particular term does not
 16 mean that there is a genuine dispute requiring the Court to depart from the claim language itself.

17 **B. Claim Terms Should Be Given Their Ordinary Meaning**

18 “It is a bedrock principle of patent law that the claims of a patent define the invention to
 19 which the patentee is entitled the right to exclude.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312
 20 (Fed. Cir. 2005) (internal quotes omitted). While other evidence may be useful to put claim
 21 language in context, “the claim construction inquiry … begins and ends in all cases with the
 22 actual words of the claim.” *Teleflex, Inc. v. Ficosa N. Am. Corp.*, 299 F.3d 1313, 1324 (Fed. Cir.
 23 2002). There is “a heavy presumption that claim terms carry their full ordinary and customary
 24 meaning, unless [the accused infringer] can show the patentee expressly relinquished claim
 25 scope.” *Epistar Corp. v. ITC*, 566 F.3d 1321, 1334 (Fed. Cir. 2009). “[T]he ordinary and
 26 customary meaning of a claim term is the meaning that the term would have to a person of
 27 ordinary skill in the art in question at the time of the invention, *i.e.*, as of the effective filing date

1 of the patent application.” *Phillips*, 415 F.3d at 1313. The task of comprehending the claims is
2 not always difficult – it often “involves little more than the application of the widely accepted
3 meaning of commonly understood words.” *Id.* at 1314.

4 **C. Intrinsic Evidence Controls Claim Construction**

5 The specification is “the single best guide to the meaning of a disputed term.” *Phillips*,
6 415 F.3d at 1315. However, courts cannot “import limitations into claims from examples or
7 embodiments appearing only in a patent’s written description, even when a specification
8 describes very specific embodiments of the invention or even describes only a single
9 embodiment.” *JVW Enters. v. Interact Accessories, Inc.*, 424 F.3d 1324, 1335 (Fed. Cir. 2005).
10 The rationale for this rule is straight-forward: “[i]f everything in the specification were required
11 to be read into the claims, or if structural claims were to be limited to devices operated precisely
12 as a specification-described embodiment is operated, there would be no need for claims.” *SRI*
13 *Int’l v. Matsushita Elec. Corp. of Am.*, 775 F.2d 1107, 1121 (Fed. Cir. 1985). “Accordingly,
14 particular embodiments appearing in the written description will not be used to limit claim
15 language that has broader effect.” *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*,
16 381 F.3d 1111, 1117 (Fed. Cir. 2004).

17 In addition to the specification, the court “should also consider the patent’s prosecution
18 history, if it is in evidence.” *Phillips*, 415 F.3d at 1317. “Like the specification, the prosecution
19 history provides evidence of how the PTO and the inventor understood the patent.” *Id.*
20 However, because the prosecution history represents an “ongoing negotiation” rather than the
21 “final product” of the negotiation, “it often lacks the clarity of the specification and thus is less
22 useful for claim construction purposes.” *Id.* The prosecution history only limits the claims when
23 the patentee’s intent to surrender claim scope was “clear and unmistakable.” *Cordis Corp. v.*
24 *Medtronic Ave, Inc.*, 339 F.3d 1352, 1358 (Fed. Cir. 2003). This standard is met when the
25 patentee “explicitly characterizes an aspect of his invention in a specific manner to overcome
26 prior art.” *Purdue Pharma L.P. v. Endo Pharm, Inc.*, 438 F.3d 1123, 1136 (Fed. Cir. 2006)

1 (finding no disavowal of claim scope where inventors touted a feature to overcome the prior art,
 2 but that feature was not described as a “necessary feature” of the claimed formulations).

3 “Extrinsic evidence,” such as expert and inventor testimony, dictionaries, treatises, and
 4 other evidence external to the patent and prosecution history may also be considered in claim
 5 construction. *Phillips*, 415 F.3d at 1317. The Federal Circuit has made clear, however, that
 6 extrinsic evidence is “less significant than the intrinsic record in determining the legally
 7 operative meaning of claim language.” *Id.* (internal quotes omitted). A court may rely on
 8 extrinsic evidence “in order to better understand the underlying technology and may also rely on
 9 dictionary definitions when construing claim terms, so long as the dictionary definition does not
 10 contradict any definition found in or ascertained by a reading of the patent documents.” *Id.* at
 11 1322-23.

12 **D. Limitations Should Not Be Imported From The Specification**

13 Claim construction is not an exercise in using the specification to limit patent claims.
 14 “The written description part of the specification itself does not delimit the right to exclude.
 15 That is the function and purpose of claims.” *Markman v. Westview Instruments, Inc.*, 52 F.3d
 16 967, 980 (Fed. Cir. 1995). The Federal Circuit repeatedly confirms that claim construction
 17 should not import additional limitations into patent claims from the specification. Claim
 18 construction may deviate from the ordinary and customary meaning of a disputed term only if (1)
 19 a patentee sets out a definition and acts as his own lexicographer, or (2) the patentee disavows
 20 the full scope of a claim term either in the specification or during prosecution. *Thorner v. Sony*
 21 *Computer Entertainment LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012). To limit the claims, the
 22 Federal Circuit requires specific statements clearly showing an intent to limit the claims, stating
 23 “the claims of the patent will not be read restrictively unless the patentee has demonstrated a
 24 clear intention to limit the claim scope using **words or expressions of manifest exclusion or**
 25 **restriction.**” *Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 412 F.3d 1284, 1289 (Fed. Cir. 2005)
 26 (emphasis added).

1 While a patent specification may describe one or more preferred embodiments, the claims
 2 should not be limited to particular preferred embodiments from the specification. “The patentee
 3 is entitled to the full scope of his claims, and we will not limit him to his preferred embodiment
 4 or import a limitation from the specification into the claims.” *Kara Tech. Inc. v. Stamps.com,*
 5 *Inc.*, 582 F.3d 1341, 1348 (Fed. Cir. 2009). Indeed, “even where a patent describes only a single
 6 embodiment, claims will not be read restrictively unless the patentee has demonstrated a clear
 7 intention to limit the claim scope using words or expressions of manifest exclusion or
 8 restriction.” *Innova/Pure Water, Inc. v. Safari Water Filtration Sys., Inc.*, 381 F.3d 1111, 1117
 9 (Fed. Cir. 2004); *see also Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) (“we
 10 have expressly rejected the contention that if a patent describes only a single embodiment, the
 11 claims of the patent must be construed as being limited to that embodiment.”) Similarly, although
 12 a patentee refers to the “present invention” in the specification, such statements do not allow
 13 importing limitations into the claims. *Trading Techs. Int'l., Inc. v. eSpeed, Inc.*, 595 F.3d 1340,
 14 1353-54 (Fed. Cir. 2010).

15 Claims should also not be limited to exclude a preferred embodiment disclosed in the
 16 patent specification. A claim construction excluding a preferred embodiment “would require
 17 highly persuasive evidentiary support.” *Anchor Wall Sys. v. Rockwood Retaining Walls, Inc.*,
 18 340 F.3d 1298, 1308 (Fed. Cir. 2003). “[A] construction [that] would not read on the preferred
 19 embodiment . . . would ‘rarely, if ever, [be] correct and would require highly persuasive
 20 evidentiary support.’” *Interactive Gift Exp., Inc. v. Compuserve, Inc.*, 256 F.3d 1323, 1343 (Fed.
 21 Cir. 2001).

22 **E. Independent Claims Should Not Be Limited To The Elements Of A
 23 Dependent Claim**

24 Where an independent claim has dependent claims that add limitations, those limitations
 25 should not be interpreted to be part of the independent claim. As the Federal Circuit stated in the
 26 *Phillips* case, “[t]he presence of a dependent claim that adds a particular limitation gives rise to a
 27

1 presumption that the limitation in question is not present in the independent claim.” *Phillips v.*
 2 *AWH Corp.*, 415 F.ed 1303, 1314, 1315 (Fed. Cir. 2005).

3 **IV. DISPUTED CONSTRUCTIONS – ‘769 PATENT**

4 **A. “Determining An Input Block of W Signal Representations From The Input
 5 Stream”**

6 This claim element (or the similarly-worded “determining an input block of signal
 7 representations from the input stream”) appears in asserted claims 1, 10 and 19 of the ‘769
 8 patent. The parties’ respective constructions are set forth below.

EPL’s proposed construction	Apple’s proposed construction
Plain and Ordinary Meaning, subject to the term “W” defined separately	searching for and identifying the starting position of an input block of W signal representations that is similar to the output stream/searching for and identifying the starting position of an input block of signal representations that is similar to the output stream.

17 **1. This phrase does not require construction**

18 As the Federal Circuit states, claim construction “is not an obligatory exercise in
 19 redundancy.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1568 (Fed. Cir. 1997). The
 20 Court need not apply a new construction to a term or phrase that can be readily understood and
 21 which uses common language. The Federal Circuit “has repeatedly held that a district court is
 22 not obligated to construe terms with ordinary meanings, lest trial courts be inundated with
 23 requests to parse the meaning of every word in the asserted claims.” *O2 Micro Int’l Ltd. v.*
 24 *Beyond Innovation Tech. Co., Ltd.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008). EPL respectfully
 25 submits that the Court should particularly avoid attempts to rewrite entire claim elements in the
 26
 27

1 guise of claim construction as this presents a significant risk of improperly altering the scope of
2 the claim.

3 The claim language uses the words “an input block of W signal representations” or “an
4 input block of signal representations.” Apple’s proposed construction retains these portions of
5 the claim language unaltered. Apple’s construction, however, replaces the word “determining”
6 with “searching for and identifying the starting position of” and further adds that the signal
7 representations must be “similar to the output stream.” The claim language as written does not
8 need the further “defining” that Apple seeks. Indeed, that “definition” is actually an attempt to
9 import extra limitations into the claims. The word “determining” does not connote all of the
10 additional limitations that Apple ascribes to it with this proposed re-write. Indeed, elsewhere, in
11 the very same claim, Apple contends that the words “determined by” mean “uniquely specified
12 by.” *See* Joint Claim Construction Statement at 4-5. Here, however, Apple abandons its own
13 proposed interpretation of the root word “determine” and seeks to re-write the claim element.
14 Essentially, Apple seeks to confine the general descriptive term “determining” to a particular,
15 narrow meaning. The Federal Circuit warns against just such an approach: “General descriptive
16 terms will ordinarily be given their full meaning; modifiers will not be added to broad terms
17 standing alone.” *Johnson Worldwide Assocs. v. Zebco Corp.*, 175 F.3d 985, 989 (Fed. Cir.
18 1999).

19 Nothing in the phrase “determining an input block of [W] signal representations from the
20 input stream” indicates that 1) the determination must be made by the specific process of
21 searching and identifying as Apple asserts, or 2) that they must meet some similarity measure to
22 the output stream as Apple’s definition would also require. The claim language does not restrict
23 itself to the particular method of determining an input block that Apple asserts. Apple seeks to
24 import these additional limitations into the claim from the specification. As set forth in greater
25 detail in the following sections, Apple cannot carry the heavy burden to show that the claim
26 should be further limited as it argues.

27

28

2. Apple's proposed construction restricts the claim to a particular embodiment

As discussed previously, while the specification of a patent may be helpful in understanding the invention, “[t]he written description part of the specification itself does not delimit the right to exclude. That is the function and purpose of claims.” *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 980 (Fed. Cir. 1995). The Federal Circuit cautions that “although the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005).

Apple’s proposed construction of this claim element violates these repeated cautions by seeking to import a particular embodiment from the specification into the claims. Here, Apple appears to rely heavily on certain examples from the specification that involve a particular method of determining an input block. Apple points to examples in the specification that refer to searching for and identifying the starting position of an input block and argues that as a consequence, the claim language should be limited to those examples. Apple’s designated expert, Dr. Smith, makes a similar argument, simply pointing to various passages in the specification that are consistent with Apple’s narrowing interpretation of the claim language. Some of those passages, Apple and its expert assert, refer to the “present invention.” However, the Federal Circuit holds that even where a patentee makes reference to the “present invention” in the specification, such a reference does not allow importing limitations into the claims.

Trading Techs. Int'l., Inc. v. eSpeed, Inc., 595 F.3d 1340, 1353-54 (Fed. Cir. 2010).

Instead, to limit claims based on disclosures in the specification, Apple must point to words that demonstrate “a clear intention to limit the claim scope using words or expressions of manifest exclusion or restriction.” *Prima Tek II, L.L.C. v. Polypap, S.A.R.L.*, 412 F.3d 1284, 1289 (Fed. Cir. 2005). Apple simply cannot point to any such words. It can point to examples in the specification, but none of those examples use words of manifest exclusion or restriction to state that they represent the only way to implement the invention. Apple and its expert simply

1 focus on particular examples and argue that those examples should limit the claims. Clear
2 precedent from the Federal Circuit (including that cited above) confirms that this is not the
3 proper way to construe patent claims.

4 **3. Apple's proposed construction would exclude a preferred
5 embodiment**

6 “A construction [that] would not read on the preferred embodiment . . . would ‘rarely, if
7 ever, [be] correct and would require highly persuasive evidentiary support.’” *Interactive Gift
8 Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1343 (Fed. Cir. 2001). Here, Apple’s proposed
9 construction would exclude a preferred embodiment from the ‘769 patent. Apple’s expert, Dr.
10 Smith, explains that he supports Apple’s proposed construction because the specification
11 describes performing the determining step of the patented method by essentially a 3-step process:
12 1) starting with an input block of size W (a parameter for the analysis window size) plus a search
13 region referred to by the parameter Kmax, 2) searching that block for a particular group of signal
14 representations that have a maximum similarity to a group of the same size in the output signal
15 (the size of the group is defined by the amount of overlap needed for the particular modification),
16 and 3) choosing the precise input block of size W that contains the group with the maximum
17 similarity for overlap. See, e.g., Smith Decl., ¶ 47; Smith Depo. (Ledahl Decl., Ex. E) at 97:6-
18 101:12.

19 Apple and Dr. Smith assert that because certain examples in the specification use these
20 three steps as part of the determining step, that concept should be incorporated into the language
21 of claim 1, as set forth in Apple’s proposed definition. The ‘769 patent, however, discloses a
22 different preferred embodiment where these steps are not performed. In particular, the patent
23 discloses an embodiment in which searching and the performance of a similarity measure is not
24 needed, because the correct interval can simply be predicted. For example, the ‘769 patent
25 discloses that “[a]n important attribute of the SOLAFS method is that the starting position which
26 provides the maximum similarity over the range of possible starting positions for a given input
27 block can often be determined without evaluating the similarity measure for all possible

1 starting positions.” ‘769 patent, Col. 5:42-47 (emphasis added). The patent refers to this
2 approach as “prediction.” As the specification notes, “[a]n advantage which occurs in
3 accordance with the present invention occurs as a result of the fact that the shift distance Km
4 which maximizes the similarity in the overlap region can often be predicted **without**
5 **computation of the similarity.**” ‘769 patent, Col. 10:21-25 (emphasis added). Apple’s
6 construction, and its purported basis for the construction, would exclude this preferred
7 embodiment of the ‘769 patent, and thus violate a core principle of claim construction articulated
8 by the Federal Circuit.

9 **4. Apple’s proposed construction improperly imports limitations from a**
10 **dependent claim**

11 As described above, Apple’s proposed claim construction assumes that the determining
12 step must involve a 3 step process. Apple bases this position on particular embodiments within
13 the specification. As shown above, the particular embodiments upon which Apple relies are not
14 the only way that the determining step can be performed. Thus, the language appearing in
15 independent claims 1, 10 and 19 should not be limited to the particular embodiment advocated
16 by Apple. The other, dependent, claims of the ‘769 patent bear out that Apple asks the Court to
17 improperly import a limitation.

18 In particular, dependent claim 3 of the ‘769 patent expressly recites that the determining
19 step of claim 1 may be performed using the very steps that Apple contends should limit claim 1.
20 “The presence of a dependent claim that adds a particular limitation gives rise to a presumption
21 that the limitation in question is not present in the independent claim.” *Phillips v. AWH Corp.*,
22 415 F.3d 1303, 1314-15 (Fed. Cir. 2005). Apple’s expert, Dr. Smith, admitted that the basis for
23 Apple’s proposed construction of the “determining” step is that he believed that these three steps
24 were “the only way” that he understood claim 1 to operate. Smith Depo. (Ex. E), at 97:6-101:25.
25 Dr. Smith’s analysis, however, fails to appreciate that these specific three steps are particularly
26 claimed in dependent claim 3. Thus, claim 1 necessarily includes other possible ways to perform

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28

1 the determining step, otherwise claim 3 would be mere surplussage.² Claim 3 may specifically
 2 claim the particular embodiment that Dr. Smith has focused upon, but that cannot be used to
 3 limit the scope of claim 1.

4 **5. Apple unduly relies upon extrinsic evidence**

5 Apple relies heavily on two types of extrinsic evidence to support its positions. First, it
 6 depends heavily on testimony of a paid expert to simply state his views of what the claims mean.
 7 Since claim interpretation is a question of law for the Court, such completely extrinsic evidence
 8 should be given little or no weight. “Only if there were still some genuine ambiguity in the
 9 claims, after consideration of all available intrinsic evidence, should the trial court [] resort[] to
 10 extrinsic evidence, such as expert testimony, in order to construe [a] claim.” *Vitronics Corp. v.*
 11 *Conceptronic, Inc.*, 90 F.3d 1576, 1584 (Fed. Cir. 1996). The Federal Circuit went on to state
 12 that “where the patent documents are unambiguous, expert testimony regarding the meaning of a
 13 claim is entitled to no weight.” *Id.* “Conclusory, unsupported assertions by experts as to the
 14 definition of a claim term are not useful to a court.” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1318
 15 (Fed. Cir. 2005). The Federal Circuit explained that testimony like Dr. Smith’s – “extrinsic
 16 evidence consisting of expert reports and testimony is generated at the time of and for the
 17 purpose of litigation and thus can suffer from bias that is not present in intrinsic evidence.” *Id.*

18 The problem with Dr. Smith’s testimony is that it provides just the type of extrinsic
 19 evidence that the Federal Circuit warns is “not useful” – conclusory assertions about the meaning
 20 of claim terms prepared for the purpose of litigation. Dr. Smith simply recites legal principles of
 21 claim construction in his declaration and then offers his statement of how the claims should be
 22 construed. Dr. Smith’s declaration is particularly unreliable because deposition testimony
 23 revealed that he does not even understand the principles he purports to apply. For example, Dr.
 24 Smith recited in his declaration that “I have been informed that there may also be a clear
 25 disavowal of claim coverage in the specification or prosecution history.” Smith Decl., ¶ 22.

26 ² Apple may contend that claim 3 can be ignored because it further modifies dependent claim 2,
 27 not claim 1 directly. Claim 2, however, incorporates claim 1 and all of its limitations, so if claim
 28 1 were limited as Apple argues, claim 2 would have the same limitations, and claim 3 would still
 be rendered mere surplus.

1 When asked whether he applied this principle at any point in his analysis, Dr. Smith was unable
2 to understand what the principle meant or how it might have been applied. In deposition, Dr.
3 Smith stated, “I guess I want to know what does it mean legally to have a clear disavowal of
4 claim coverage in this specification.” Smith Depo. (Ex. E) at 66:7-25. Dr. Smith went on to
5 state that, “I signed the declaration not being aware that that particular phrase had been applied
6 because I don’t know – I’ve been informed that there’s a clear disavowal. Now you’re asking
7 me to apply it. Being informed about it is one thing but then being asked to apply it specifically
8 is another.” *Id.* at 67:1-19. Dr. Smith further asserted that he applied this principle not by
9 looking for words of manifest exclusion, as the Federal Circuit mandates, but by concluding that
10 “claim coverage is disavowed by virtue of accepting a more limited definition of a term by
11 implying a more limited definition of a term in the specification or prosecution history.” Smith
12 Depo. (Ex. E) at 71:9-19 (emphasis added). Purportedly implying a particular narrow definition
13 of a term is a far cry from the words of manifest exclusion that the Federal Circuit requires to
14 find a narrowing of claim scope in the specification. Dr. Smith did not apply the principles
15 recognized by the Federal Circuit, and his opinions cannot be used to narrow the claims as Apple
16 argues.

17 Apple’s clear approach of simply providing a technical expert with legal principles of
18 claim construction that he does not understand and then purporting to rely on his incorrect
19 application of those principles is utterly unreliable and cannot support Apple’s claim
20 constructions. The error of Apple’s reliance on the extrinsic evidence of its expert’s testimony is
21 compounded by the fact that the expert relies on a second type of extrinsic evidence –
22 publications outside the file history of the patent which were not incorporated by reference into
23 the patent specification. Dr. Smith states in his declaration that he is also relying upon other
24 publications by one or more inventors of the ‘769 patent that are not part of the intrinsic record –
25 specifically, Mr. Hejna’s MIT thesis, and a paper authored by the two inventors (the Hejna &
26 Musicus paper). *See* Smith Decl., ¶ 16. Dr. Smith and Apple apply a particularly pernicious
27 type of improper extrinsic analysis here to support Apple’s proposed construction. Dr. Smith
28

1 considered extrinsic evidence which describes a method referred to generally as SOLAFS. The
 2 '769 patent also uses the term SOLAFS to refer to methods in the patent. Apple and Dr. Smith
 3 attempt to extract the gist of the SOLAFS method described in extrinsic evidence like the Hejna
 4 thesis or the Hejna and Musicus paper, and then graft that concept as a limitation onto the claims
 5 in the '769 patent. In essence, Apple and Dr. Smith seek to rewrite the claims to recite the
 6 SOLAFS method (or a particular embodiment of it) as Dr. Smith understands it from the
 7 extrinsic evidence. The claims are not so limited, and the claims, not the extrinsic evidence
 8 should form the basis for the Court's construction.

9 **B. “Wov”**

10 The claims of the '769 patent contain several parameters referenced by letters, such as
 11 “W”, “Wov”, and “Ss.” The issues regarding each of these are similar, though they are
 12 addressed in discrete sections below for the Court's convenience. This term appears in asserted
 13 claims 1, 2, 10 and 11 of the '769 patent. The parties' competing constructions are reproduced
 14 below:

EPL's proposed construction	Apple's proposed construction
a parameter that represents the number of signal representations to be overlapped as determined by W and the time-scale modification.	a parameter that fixes the number of signal representations to be overlapped as determined by W and the time-scale modification.

20 As the Court can readily appreciate, there is only one word of difference between the
 21 parties' respective constructions. EPL construes the term as “a parameter that represents the
 22 number of signal representations,” while Apple argues that the definition should recite “a
 23 parameter that fixes the number of signal representations.” This issue is common to all of the
 24 “parameter” claim terms that are in dispute.

1 **1. The specification describes parameters as “representing” not “fixing”**
2 **an attribute or value**

3 Apple offers little basis or explanation for its proposed construction, but the intrinsic
4 evidence shows that the patent uses the term consistent with EPL’s proposed construction. For
5 example, for various parameters, the patent specification states that “Sa is the analysis shift and
6 **represents** the interframe interval between successive search intervals . . . Ss is the synthesis
7 shift and **represents** the interframe interval between successive windows in the output signal . . .
8 Km is the window shift and **represents** the number of data samples” ‘769 Patent, Col.
9 12:46-51 (emphasis added). There is not a single reference in the specification to a particular
10 parameter “fixing” something. The specification sometimes refers to a particular parameter
11 being a fixed number during a particular time scale modification, but that is not the same as the
12 parameter fixing that attribute. The parameter represents the attribute, which is a fixed number.
13 In discussing the Wov parameter, the specification states that “Wov=W-Ss, is the number of
14 points in the overlap region.” EPL’s definition matches the use of the Wov parameter in the
15 patent specification. Apple’s definition imports an additional concept that never appeared in the
16 specification.

17 **2. Apple’s proposed definition injects confusion**

18 As shown above, the specification describes Wov to be a parameter value that can be
19 calculated from the values W and Ss. Thus, it would be possible to set values for W and Ss
20 which would then determine the value of Wov. The claims use this parameter in a similar way,
21 reciting that Wov is “determined by W and the time-scale modification.” If Wov is determined
22 by these items, arguably they “fix” the number of signal representations to be overlapped, rather
23 than Wov itself. The patent specification makes clear that these various parameters are
24 interrelated and that altering one would necessarily alter one or more others. EPL’s proposed
25 definition is consistent with this relationship by stating that a parameter represents a particular
26 value. Apple’s proposed definition injects confusion by suggesting that a particular parameter by
27 itself fixes something – suggesting that each parameter may be set separately without regard to

1 the others. It is not at all clear why Apple proposes this language, but its proposal creates
 2 unnecessary confusion.

3 Apple's expert was able to offer little clarification to help explain this issue. His
 4 declaration is far from consistent, suggesting variously that Wov "establishes" a quantity (¶ 99),
 5 and at other times that "Wov is fixed for a particular time scale modification" (¶ 103).
 6 Ultimately, Dr. Smith simply states that the definition should be Apple's proposed definition,
 7 and then simply quotes long passages from the patent specification that never use the term as
 8 Apple proposes. *See, e.g.*, Smith Decl., ¶¶ 101, 102.

9 Dr. Smith was also unable to explain how EPL's proposed construction was inconsistent
 10 with any passage in the patent specification. Smith Depo. (Ex. E) at 160:23-161:7. He admitted
 11 that if W and Ss were set, those would determine the value of Wov. *Id.* at 161:18-162:3. When
 12 asked whether Wov is fixed or whether it fixes something else, he stated that "it depends what
 13 you choose first." *Id.* at 162:16-163:4. Ultimately, Dr. Smith's testimony simply confirms that
 14 Apple's definition creates far more confusion than it resolves.

15 **C. "determined by"**

16 This phrase appears in claims 1 and 19 of the '769 patent. The parties' proposed
 17 constructions are shown below:

EPL's proposed construction	Apple's proposed construction
Plain and Ordinary Meaning	uniquely specified by

20 **1. This phrase does not require construction**

21 The words "determined by" are ordinary English words. Nothing in the specification
 22 suggests that they are used in a unique or unusual way. They appear in the context of claim
 23 language reciting that "Wov is determined by W and the time-scale modification" (claim 1) or
 24 "where the number appended is determined by the time-scale modification" (claim 19). These
 25 words do not require construction any more than telling someone that their place in line at the
 26 DMV is determined by the time at which they arrived, or that a person's Body Mass Index is
 27 determined by the person's height and weight. This is a phrase that has common usage.

1 Defining it adds nothing but excess confusion and potential dispute about what “uniquely
2 specified” actually means. Apple suggests that this definition is somehow necessary, but its
3 expert, Dr. Smith, offers no meaningful explanation of why additional definition is needed. *See*
4 Smith Decl., ¶¶ 121-130.

5 **2. Apple’s definition is not consistent with usage throughout the claims**

6 Claim terms should generally be given the same meaning when used in multiple instances
7 within the patent claims. As discussed previously, another phrase in dispute in this case is
8 “determining an input block” There, Apple does not appear to argue that determining
9 means “uniquely specifying,” even though here it argues that this is the only acceptable meaning
10 of the root word “determine” in these claims. In the earlier element, Apple argues that
11 “determining” means “searching for and identifying the starting position . . . that is similar to the
12 output stream.” Apple’s arguments are positions of convenience to support its efforts to avoid
13 infringement, rather than principled positions based on the actual intrinsic evidence of the ‘769
14 patent.

15 **3. Apple relies on conclusory extrinsic expert testimony, not proper
16 intrinsic evidence**

17 In his declaration, Dr. Smith makes conclusory statements that the intrinsic evidence
18 supports his opinion of the definition of “determined by.” *See* Smith Decl., ¶¶ 122-124. None of
19 the passages Dr. Smith cites actually define “determined by,” nor use the words “uniquely
20 specified.” Dr. Smith further relies on various dictionaries, none of which actually use the
21 definition Apple offers. None of this evidence actually shows that the term “determined by”
22 needs to be construed, and it certainly does not show that Apple’s proposed construction is either
23 necessary or correct. To the extent Apple believes that this definition somehow narrows the
24 meaning of the term, it must point to words of manifest exclusion to support such a narrowing. It
25 cannot do so, and thus the Court should not accept Apple’s vague, but apparently-narrowing,
26 definition of this phrase.

1 **D. “W”**

2 This is another of the parameter terms (like Wov and Ss) and presents similar issues. The
 3 term appears in claims 1, 2, 10 and 11 of the ‘769 patent. The parties’ respective constructions
 4 are shown below:

5 EPL’s proposed construction	6 Apple’s proposed construction
7 a parameter that represents the duration of the 8 windowed segments of the input signal.	9 a parameter that fixes the duration of the 10 windowed segments of the input signal that 11 represents the smallest unit that the time-scale 12 modification method manipulates.

13 Like the “Wov” term discussed previously, one of the primary issues regarding this term
 14 is Apple’s proposal to use the word “fixes” instead of “represents” in the definition. Apple also
 15 seeks to add an additional phrase from the specification that is not definitional for “W” and that
 16 EPL is concerned will inject unnecessary confusion into the term.

17 **1. Parameters represent, rather than fix, attributes**

18 As discussed in Section B, above, the intrinsic evidence shows that the patentee identified
 19 various parameters as representing a particular attribute of the time-scale modification method.
 20 The specification never describes those variables as “fixing” that attribute. Indeed, that usage is
 21 inconsistent with the express language of the specification as described previously. For the same
 22 reasons set forth regarding “Wov,” “W” should be defined as representing the particular
 23 attribute, not fixing the attribute as Apple asserts.

24 **2. The second part of Apple’s proposed construction is unnecessary and
 25 confusing**

26 Apple adds the phrase “that represents the smallest unit that the time-scale modification
 27 method manipulates” to its proposed construction. EPL does not dispute that this phrase appears
 28 in the specification. EPL does, however, dispute that it is a necessary part of the definition of
 “W.” The specification describes W as the “window length.” For example, the specification
 states that “window length W is the duration of windowed segments of the input signal – this

1 parameter is the same for input and output buffers and represents the smallest unit of the input
 2 signal, for example speech, that is manipulated by the method.” ‘769 Patent, Col. 7:9-13. The
 3 first portion of that statement is definitional – “the duration of windowed segments of the input
 4 signal.” The remainder is a further discussion of the method, but not a statement of the
 5 definition of “W.”

6 EPL is concerned with Apple’s effort to include the additional, non-definitional, language
 7 about “W” because it could mislead the trier of fact. It is undisputed that the value of the
 8 parameter “W” can change from one operation of the time-scale modification method to another.
 9 See Smith Depo. at 144:3-18 (“Well, W is a parameter that could be changed from one time-
 10 scale modification instance to another.”). Apple’s proposed definition could lead to unnecessary
 11 confusion by suggesting that the value of W should be the smallest unit that the time-scale
 12 modification method is capable of manipulating. This would clearly be incorrect. Dr. Smith
 13 admits that W could have different values in different operations of the method. Thus, while it is
 14 true that for a given operation the value of W is the smallest unit that the method will
 15 manipulate, Apple’s proposed language, standing alone, suggests that it is the smallest unit the
 16 method is capable of manipulating. Apple’s additional proposed language creates this
 17 unnecessary potential confusion without providing any further definitional clarification. As
 18 shown above, the specification uses only the language offered by EPL as a definition of “W” and
 19 does not suggest that the extra phrase added by Apple is necessary to define the term.

20 **E. “Ss”**

21 This is the final parameter claim term that is offered for construction. The term appears
 22 in asserted claims 2 and 11. The parties’ respective proposed constructions are shown below:

EPL’s proposed construction	Apple’s proposed construction
a parameter that represents the interframe interval between successive analysis windows along the output signal.	a parameter that fixes the interframe interval between successive windows of length W along the output signal.

1. Apple's addition of "fixes" is improper and unsupported

Apple’s proposed wording to add the word “fixes” to its definition is improper for all the reasons discussed previously in Section B regarding the “Wov” term. As set forth below, Apple’s proposed language conflicts with the express definition in the patent specification, which matches EPL’s definition, not Apple’s.

2. EPL's definition is an express definition from the patent specification

Apple does not appear to dispute that where a patentee chooses to act as his or her own lexicographer and to set forth a definition in the patent specification, that definition should govern. Here, EPL’s proposed definition conforms to the definition appearing in the patent specification. The specification states “Ss is the synthesis shift and represents the interframe interval between successive windows in the output signal.” ‘769 patent, Col. 12:49-51. Elsewhere, the patent confirms that “synthesis shift Ss is the interframe interval between successive analysis windows along the output signal.” ‘769 patent, Col. 7:16-18. These definitions confirm that Ss represents rather than fixes the interframe interval. This is the primary difference between the parties’ proposed constructions. EPL’s construction reflects the usage in the specification. Apple’s does not, since the specification never states that the parameter “fixes” the interframe interval as Apple proposes.

The second difference between the parties relates to whether the windows along the output signal should be referred to as “analysis windows” or “windows of length W ” along the output signal. EPL respectfully submits that its proposed construction, unlike Apple’s is drawn directly from the language of the specification. It is not clear why Apple chose to depart from the language of the specification for its definition or what further clarity is drawn from Apple’s definition. Dr. Smith offers nothing about this aspect of Apple’s proposed definition in his declaration.

F. "time scale modification/time scale modifying"

This term appears in claims 1, 10, and 19 of the '769 patent. The parties' respective constructions are set forth below:

EPL's proposed construction	Apple's proposed construction
speeding up or slowing down the playback rate	a change to a signal's rate of reproduction without modifying its pitch/ changing a signal's rate of reproduction without modifying its pitch

The primary difference between the parties' proposed definitions is the latter portion of Apple's proposed definition – "without modifying its pitch." The first portions of the parties' definitions seem to be similar, EPL's is simply more readily understood, while Apple's uses slightly more complicated wording. The second portion of Apple's definition, "without modifying its pitch" is not a part of the definition of time scale modification as used in the '769 patent. It is a description of the result of performing a particular method of time scale modification.

1. EPL proposes a clear definition from the specification

The specification of the '769 patent describes time-scale modification ("TSM") of a signal as something that can be achieved by either "time-scale compression, i.e., a method for speeding up a playback rate of the signal, or by time-scale expansion, i.e. a method for slowing-down the playback rate of the signal." '769 Patent, Col. 1:27-31. This clear statement from the specification corresponds directly to EPL's proposed definition, and can be readily understood. While the first portion of Apple's proposed construction, "a change to a signal's rate of reproduction" is consistent with this definition, it uses unnecessarily more complex terminology. Apple certainly cannot argue that EPL's proposed definition is inconsistent with usage in the specification, since the specification expressly refers to time-scale modification as speeding up or slowing down the playback rate.

2. Apple's added language "without modifying its pitch" is inconsistent with the patent specification

The second portion of Apple's proposed definition stands in direct conflict with the clear and express usage of the term "time-scale modification" in the specification of the '769 patent.

1 The very beginning of the specification refers to the need for “a method which will provide time-
2 scale modification without modifying the pitch or local period of the time-scale modified
3 signals.” ‘769 Patent, Col. 1:17-21. If the words “time-scale modification” included “without
4 modifying its pitch” as part of their meaning, this passage from the patent specification would
5 make no sense. Using Apple’s proposed definition as a substitute for the words time-scale
6 modification, this specification passage would read: “a method which will provide a change to a
7 signal’s rate of reproduction without modifying its pitch without modifying the pitch or local
8 period of the time-scale modified signals.” The redundancy from this passage shows that
9 Apple’s definition incorporates an additional concept into the term “time-scale modification”
10 that was not intended by the patentee.

11 Testimony from Apple’s expert, Dr. Smith, confirms that Apple is applying improper
12 extrinsic evidence and methods to reach its definition. For example, Dr. Smith testified that “It’s
13 a term of art that is used in many papers, and so one of ordinary skill in the art would know
14 without even reading the specification or even knowing this patent exists would know that time-
15 scale modification includes rate playback change without changing pitch.” Smith Depo. at
16 180:9-19. Obviously, claim construction starts with the intrinsic evidence and usage of a term in
17 the context of the patent at issue. Apple’s analysis apparently begins and ends without
18 consideration of the usage in the intrinsic evidence. That intrinsic evidence contradicts Apple’s
19 proposed definition.

20 **3. Apple’s added “without modifying its pitch” definition is inconsistent
21 with the use of the term in the claims**

22 The Federal Circuit holds that “while certain terms may be at the center of the claim
23 construction debate, the context of the surrounding words of the claim also must be considered in
24 determining the ordinary and customary meaning of those terms.” *ACTV, Inc. v. Walt Disney*
25 Co., 346 F.3d 1082, 1088 (Fed. Cir. 2003). Here, Apple’s proposed construction inserts an
26 additional element into the term “time-scale modification” that would render the term non-
27 sensical in the context in which it appears in the patent claims. In claim 1 of the ‘769 patent, the
28

1 term “time-scale modification appears not only in the claim preamble, but also in the final
 2 element. Initially, in the preamble, the term is used to refer only to the adjustment of the
 3 playback rate of a signal. The extent to which that adjusted signal does or does not have an
 4 altered pitch is a function of following the steps recited in the claim – it is not a function of the
 5 term “time-scale modification” itself. Apple’s expert, Dr. Smith, admitted that the function of
 6 preserving the pitch was achieved by “synchronization in the sense of a synchronized overlap-
 7 add.” Smith Depo, 182:2-17. The overlap-add aspects of the claim are recited in other elements,
 8 such as “overlapping Wov signal representations . . .” found in the body of the claim. This is not
 9 a defining feature of time-scale modification, as recited in the preamble.

10 The final element of claim 1 recites that Wov (discussed earlier) “is determined by W and
 11 the time-scale modification.” Here, it is clear that the time-scale modification, refers to the
 12 adjustment in the playback rate, independent of whether pitch is modified. This portion of the
 13 claim makes clear that the number of signal representations to be overlapped will be determined
 14 (in part) by how much the rate of playback is being altered. EPL’s proposed construction is
 15 consistent with this usage of the term in the claims. Apple’s is not.

16 **V. DISPUTED CONSTRUCTIONS – ‘903 PATENT FAMILY**

17 **A. “Current Time”**

18 This is the only term from the ‘903 patent family in dispute. It appears in asserted claims
 19 4, 12, and 22 of the ‘903 patent, claims 4 and 16 of the ‘050 patent and claims 1, 6, 7 and 11 of
 20 the ‘720 patent. The parties’ competing constructions are reproduced below:

EPL’s proposed construction	Apple’s proposed construction
a current position in the media content that can be expressed either as the time elapsed since the beginning of the media content presentation or as a location in the media content stream that is currently being played	measure of time that is unresolved as to whether the rendering system should return a presentation time parameter value or a data time parameter value

1. EPL's definition comes directly from the patent specification

2 The specification of the ‘903 patent³ states that “Current time is, in effect, a current
3 ‘position’ in the media content that is being displayed and rendered.” ‘903 patent, Col. 1:27-29.
4 The specification and claims both confirm that the current time can be understood to reflect a
5 presentation time and a content time. ‘903 patent, Col. 1:50-2:7. The presentation time is
6 referenced in the patent as “the time elapsed since the beginning of the media content
7 presentation (hereafter called ‘Presentation Time’).” *Id.* Col. 1:52-55. The content time is
8 identified in the specification as “a location in the media content stream that is currently being
9 played.” *Id.* Col. 1:64-66. The patent explains that in normal speed playback, these two possible
10 representations of “current time” are the same. *Id.* Col. 2:8-10. When the playback rate is
11 altered, however, the amount of presentation time is different than the content time because, for
12 example, at 2x (double) speed, two minutes of content time will be presented in one minute of
13 presentation time.

2. Apple's definition is inconsistent with the specification

15 EPL's proposed definition precisely tracks the express language of the specification of
16 the '903 patent. Apple's proposed definition is nowhere to be found in the patent specification.
17 Apple cannot point to any place where the specification states that "current time" is an
18 "unresolved" measure. To the contrary, the specification states that "current time" can be
19 expressed in two different ways and explains that different components in a rendering system
20 require one or the other measure of current time. *See, e.g.*, '903 patent, Col. 2:20-35. The '903
21 patent teaches methods of insuring that each component of a system receives the correct form of
22 the "current time" in situations where the distinction between the two expressions of current time
23 is important, such as where the playback speed is altered. Apple's definition inserts unnecessary
24 and unsupported ambiguity into the term and should be rejected.

³ EPL refers in this section to the '903 patent for convenience. The same text referenced here appears in the specifications of the '050 and '720 patents as well.

1 Dated: November 8, 2013

Respectfully submitted,

2 RUSS AUGUST & KABAT

3
4 By: /s Brian D. Ledahl
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5 Attorneys for Plaintiff
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